UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SEFKET REDZEPAGIC, on behalf of himself and others similarly situated,

Plaintiff,

- against -

14-cv-9808 (ER)

ROBERT HAMMER, MELOHN PROPERTIES INC., THE MELOHN GROUP LLC, L 4750, LLC, A 4750, LLC, 4750 BEDFORD L.L.C., LEON MELOHN, ALFONS MELOHN, and JOHN DOES #1-10, jointly and severally,

Defendants.

- x

MEMORANDUM OF LAW IN SUPPORT OF THE MELOHN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SEEKING DISMISSAL OF THE COMPLAINT AND GRANTING THEM JUDGMENT ON THE COUNTERCLAIM

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PRELIMINARY STATEMENT

Defendants Melohn Properties Inc. ("Melohn"), The Melohn Group LLC, L 4750 LLC, A 4750 LLC, 4750 Bedford L.L.C., Leon Melohn and Alfons Melohn (collectively referred to as "Defendants") submit this memorandum of law in support of their motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Defendants seek dismissal of Plaintiff's claim for alleged overtime violations of the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.* ("FLSA") as well an order granting judgment to the Defendants on their counterclaim. In the alternative, Plaintiff's jury demand should be struck.

Plaintiff Sefket Redzepagic ("Plaintiff") alleges that the Defendants failed to pay him overtime when he worked as a residential building superintendent in violation of the FLSA. The Plaintiff brought this action despite the fact that he knowingly signed an agreement in which he released the Defendants of all claims including claims under the New York Labor Law ("Labor Law") and FLSA. By commencing this action which initially included claims under state law, he breached the agreement and Defendants are entitled to judgment on their counterclaim.

Not only has Plaintiff executed a release, he has little or no evidence to support his claims that he was not paid overtime. The Defendants' payroll records show that when Plaintiff reported having worked overtime he was paid overtime. In fact, Plaintiff was covered by a collective bargaining agreement ("CBA") which mandated that he be paid overtime if he worked more than 8 hours in one day or 40 hours per week. The evidence shows Plaintiff did not complain to the union about being denied overtime.

Other than his own exceedingly vague and speculative recollections about "sometimes" working overtime despite having no memory of when or how much, Plaintiff has no evidence to support his denial of overtime claims. Plaintiff claims at one time he possessed numerous records and text messages that purportedly showed all of the "after hours" repair work he performed as building superintendent. These documents were not preserved — some were discarded shortly before Plaintiff commenced this lawsuit and others were deleted *after* the litigation commenced.

Defendants, on the other hand, have extensive payroll records and timesheets completed by Plaintiff that demonstrate that he was, in fact, paid overtime when he worked additional hours. Defendants also have three years of text messages between Plaintiff and his supervisor. Notably, this text exchange does not contain even a single text about not paying Plaintiff overtime and actually reflect Plaintiff's desire to have his son work for the very same defendants he now claims denied overtime.

Plaintiff not only claims he was denied overtime but maintains that because he was "on call" as building superintendent he was to be paid for all hours of the day. Plaintiff demands pay for 24 hours per day, 7 days a week, 365 days per year for three years. The claims are not only ludicrous, but are inconsistent with case law, Department of Labor ("DOL") regulations and even Plaintiff's own deposition testimony. Indeed DOL regulations permit residential employees to work under private reasonable agreements without reporting specific hours. Here, Plaintiff was provided with a free apartment including utilities as well as free parking in order that he would be available to respond to emergencies. Indeed, even under Plaintiff's version of the facts, he is not entitled to overtime pay.

Plaintiff's claims against the individual Defendants also necessarily fail because the individual Defendants are not employers.

In light of the foregoing, Defendants seek dismissal of the complaint and judgment in their favor on their counterclaim, and in the alternative striking of Plaintiff's jury demand.

FACTS

The undisputed facts are more fully stated in Defendants' Rule 56.1 Statement. Plaintiff commenced his employment as the superintendent at a residential building at 4750 Bedford

Avenue in Brooklyn in 1993 (Tr. 30).[1] He supervised a staff of 4 people, and worked from 9:00 a.m. to 5:00 p.m. Monday to Friday with a one hour lunch. (Tr. 14-15, 191).[2] Each week Plaintiff would submit timesheets stating the hours he worked that week, and on a number of timesheets he reported having worked overtime (Ex. 4). Plaintiff was paid for all overtime he reported on his timesheets (Ex. 2, 3). Plaintiff was also paid extra for work he performed that was outside the scope of his regular job duties (Ex. 2).

Plaintiff and the other building employees were covered by a CBA between Melohn Properties, Inc. and Local 2 that provided for overtime pay when an employee worked more than 8 hours in a day or 40 hours in a week (Ex. 26). Local 2 has no record of any complaint by Plaintiff or any other employee that they were not properly paid overtime (Clanton Dep, p. 10).

In July 2014 the building was sold to an affiliate of ABRO ("ABRO"), but Plaintiff continued living in the same rent free apartment the Defendants had provided him throughout his employment. Although Plaintiff immediately retrieved his personal tools from his office when the building was sold, he failed to retrieve worksheets on which he allegedly recorded his overtime because he "was busy doing other things." (Tr. 237). The worksheets were eventually discarded by the new owner in September, 2014 (Ex. 34, pp. 5-6). Rather than accept an unconditional employment offer extended by the new owner, Plaintiff negotiated and chose to instead receive $75,000 to leave his apartment (Ex. 30).

Plaintiff signed a release of all claims, including claims under the Labor Law and FLSA, against ABRO and the Defendants, and a waiver of his right to a jury trial (Ex. 25). Shortly after signing the release, Plaintiff met with his attorneys in this case (Tr. 163). Plaintiff commenced this lawsuit in December 2014 claiming violations of the Labor Law and FLSA. His Labor Law claims were later withdrawn. Defendants counterclaimed for breach of the release agreement.

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[1] Plaintiff's deposition transcript is cited as "Tr." and is attached as an exhibit to the Affidavit of Mark Reinharz. Citation to the exhibits referred to during Plaintiff's deposition are cited as "Ex."

[2] The fact that Plaintiff received a one hour lunch would mean that Plaintiff worked a 35 hour work week. Even if he worked an additional 5 hours a week, those hours would not have to be paid at time and one half under the FLSA.

ARGUMENT

POINT I DEFENDANTS ARE ENTITLED TO JUDGMENT ON THEIR COUNTERCLAIM

It is undisputed that Plaintiffs' initial Complaint, First Amended Complaint and Second Amended Complaint (ECF Docket No. 1, 11 and 23) all asserted claims against the Defendants under both the FLSA and Labor Law. It is also undisputed that Plaintiff signed a release, releasing Defendants of all claims, including claims under the Labor Law. The release provided:

> in the event of any litigation to enforce the provisions of this Severance and Settlement Agreement and General Release, the prevailing party shall be awarded his or its reasonable attorneys' fees and costs. (Ex. 25, p. 12).

Unlike the FLSA, the Labor Law has no requirement that any such agreement be reviewed by a court. Nor are private settlements prohibited. *See Simel v. JP Morgan Chase*, 2007 U.S. Dist. LEXIS 18693, *14 (S.D.N.Y. 2007) (court rejected Plaintiff's clam that the Labor Law claims were subject to the same settlement requirements as the FLSA; "[t]he New York State law provisions on which defendant's claims rely do not contain express provisions restricting the private settlement of claims or waiver of statutory rights"); *Hummel v. AstraZeneca LP*, 575 F. Supp. 2d 568, 570 (S.D.N.Y. 2008) (agreements that release employers for claims arising under the Labor Law overtime requirements are generally valid and enforceable). Courts have repeatedly upheld the validity of broadly-worded releases with respect to claims brought pursuant to New York employment statutes. *See Dewey v. PTT Telecom Netherlands, US, Inc.*, 1995 U.S. Dist. LEXIS 13134, *6-7 (S.D.N.Y. 1995) (enforcing an "unambiguous" release of "any and all claims arising out of or in connection with [plaintiff's] employment"); *DiFilippo v. Barclays Capital, Inc.*, 552 F. Supp. 2d 417, 422 (S.D.N.Y. 2008).

Here, the agreement Plaintiff signed not only specifically provided for a release of Labor

Law claims but it also provided him with 21 days to consider the release and the ability to revoke it seven days after signing. Plaintiff testified that he understood he could discuss the release with others including an attorney (Tr. 162, 170-171). In fact, he freely admitted that he negotiated the release with ABRO over several weeks, and that when initially offered $50,000 he demanded $100,000 (Tr. 161, 215-216). He and ABRO ultimately agreed upon $75,000 although he had the option to keep his job as superintendent. (Tr. 209). Plaintiff considers himself to be an intelligent person, discussed the release with his union and was not threatened in any way by ABRO (Tr. 61, 102, 186). Plaintiff understood the Defendants were specifically included as released parties under the agreement. (Tr. 179).

In short, it is undisputed that Plaintiff breached the release, warranting judgment on the counterclaim in Defendants favor and an award of their fees as per the agreement.

POINT II PLAINTIFF SIGNED AN AGREEMENT RELEASING DEFENDANTS OF ALL CLAIMS

"[A] settlement agreement is a contract that is interpreted according to general principles of contract law." *In re Am. Exp. Fin. Advisors Sec. Litig.*, 672 F.3d 113, 129 (2d Cir. 2011). There is no requirement that a valid settlement of an FLSA claim take a particular form. *Rakip v. Paradise Awnings Corp.* 514 Fed.Appx. 917, 919-920 (11th Cir. 2013).

Defendants respectfully request the Court to approve this settlement under the FLSA due to the unique circumstances herein. First, because the release was never offered by Defendants and Plaintiff was not employed by ABRO, there can be no claim of overreaching by Plaintiff's employer. Second, the release was provided to the Plaintiff in a non-coercive atmosphere, as Plaintiff was provided an option by ABRO to accept either a job as superintendent with ABRO or $75,000. Indeed, in an e-mail sent by ABRO's attorney to Plaintiff's union representative that was forwarded to Plaintiff, ABRO made an unconditional offer of employment to Plaintiff (Ex.

30), but Plaintiff chose to take the $75,000.[3] This is hardly coercive. Plaintiff was also given ample time to consider the release, which is entirely clear as to what rights Plaintiff was waiving and about which Plaintiff admits having had the opportunity to consult with counsel and his union representative. (Tr. 162).

The court should enforce the release under the FLSA, or at the very least schedule a fairness hearing, under the circumstances here. As one circuit court has stated:

> Although it is true that the settlement agreement at issue in this case is not titled "stipulated judgment," *Lynn's Food [Stores, Inc. v. U.S.*, 679 F.2d 1350 (11th Cir. 1982)] does not stand for the proposition that any valid settlement of a FLSA claim must take a particular form. It only means that the district court must take an active role in approving the settlement agreement to ensure that it is not the result of the employer using its superior bargaining position to take advantage of the employee. *See id.* at 1354 ("[W]hen the parties submit a settlement to the court for approval, the settlement is more likely to reflect a reasonable compromise of disputed issues than a mere waiver of statutory rights brought about by an employer's overreaching. If a settlement in an employee FLSA suit does reflect a reasonable compromise over issues ... that are actually in dispute[,] we allow the district court to approve the settlement in order to promote the policy of encouraging settlement of litigation.").
>
> Here, that is exactly what the district court did—it conducted an evidentiary hearing, took testimony from three witnesses, and concluded that the settlement agreement was a "fair and reasonable [resolution] of a bona fide dispute over FLSA provisions." *Id.* at 1355.

Rakip v. Paradise Awnings Corp., 514 Fed. Appx. 917, 919-920 (11th Cir. 2013); *accord Burroughs v. Honda Mfg. of Ala., LLC,* 3 F. Supp. 3d 1277, 1284 n.1 (N.D. Ala. 2014) ("Although *Lynn's Food* uses the term 'stipulated judgment' with reference to the settlement ... it does not stand for the proposition that a settlement must take a particular form, but only that the proposed settlement must be examined by the district court for fairness to the employee").

The fact that Defendants are third party beneficiaries to the release is of no moment. For

[3] Plaintiff signed the agreement on September 3, 2014 – just days after the NLRB had dismissed his union's unfair labor practice charge. He thus waited to see what would be the best deal he could get although he still had the option to accept the offer by ABRO.

example, as Judge McMahon of this court stated in *McEachin v. Northland Group, Inc.*:

> Defendant need not be a 'party' to the Release in order to be covered by it; non-parties to a lawsuit may be covered under the terms of a release.

2012 U.S. Dist. LEXIS 178877, *15 (S.D.N.Y 2012) (citing cases); *see King v. City of Independence*, 180 Fed. Appx. 627, 629 (8th Cir. 2006) ("If a release states that it releases all claims against any and all persons, or uses similar language, it may operate as a general release, extinguishing claims against all tortfeasors, even those not party to the release."); *Lucio v. Curran*, 2 N.Y.2d 157, 139 N.E.2d 133 (1956) (non-parties to release may nonetheless be covered by its provisions). Indeed, "[w]hen an insured settles with or releases a third party from liability for a loss that the third-party has caused, the insurer's subrogation right against such party may be destroyed." *Gibbs v. Hawaiian Eugenia Corp.*, 966 F.2d 101, 106 (2d Cir. 1992).

Finally, even if this Court declines to approve the release as to Plaintiff's FLSA claims, the jury trial waiver, remains enforceable. The release clearly states:

> The parties hereto accept, generally and unconditionally, the exclusive jurisdiction of the aforesaid courts and waive any defense of forum non conveniens, waive any right to trial by jury and irrevocably agree to be bound by any judgment rendered thereby in connection with this Severance and Settlement Agreement and General Release. (Ex. 25, p. 11).

Such agreements are enforceable, and Plaintiff's jury waiver should be upheld here. *See e.g.*, *Brown v. Cushman & Wakefield, Inc.*, 235 F. Supp. 2d 291, 295 (S.D.N.Y. 2002) (upholding jury waiver in employment case); *Morris v. McFarland Clinic, P.C.*, 2004 WL 306110, *5 (S.D. Iowa 2004) (holding jury waiver in employment contract was enforceable); *Schappert v. Bedford, Freeman & Worth Publ'g Group LLC*, 2004 WL 1661073, *12 (S.D.N.Y. 2004) (same).[4]

[4] Even if the release is ultimately determined to be unenforceable, the $75,000 paid to Plaintiff would offset any monies claimed as owed to Plaintiff. "[T]he sums paid to secure releases are applied as partial payments of the amounts due, the computation of those amounts must be made by the District Court on remand, in the light of the stipulation, but with deduction of the payments already made from the totals due for both overtime compensation

POINT III PLAINTIFF IS UNABLE TO CARRY HIS BURDEN TO PROVE UNPAID OVERTIME

To state a *prima facie* overtime claim under the FLSA, the plaintiff must establish that (1) he worked compensable hours in excess of forty hours per week, (2) the employer knew or should have known that he worked overtime, and (3) he was not properly compensated for the overtime worked. *Wolman v. Catholic Health Sys. of Long Island, Inc.*, 853 F. Supp. 2d 290, 302 (E.D.N.Y. 2012), *aff'd in part and rev'd in part on other grounds sub nom, Lundy v. Catholic Health Sys. of Long Island, Inc.*, 711 F.3d 106 (2d Cir. 2013).

"Ordinarily, an employee seeking to recover unpaid … overtime under [the] FLSA 'has the burden of proving that he performed work for which he was not properly compensated.'" *Moon v. Kwon,* 248 F. Supp. 2d 201, 219 (S.D.N.Y. 2002) *quoting Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946); *accord Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 66-67 (2d Cir. 1997); *Rivera v. Ndola Pharmacy Corp.*, 497 F. Supp. 2d 381, 388 (E.D.N.Y. 2007). Significantly, the Second Circuit has noted:

> [T]he district court is not permitted to "just accept [plaintiff's] statement of the damages." Rather, there must be credible evidence to show "the amount and extent of [the uncompensated] work as a matter of just and reasonable inference."

Hosking v. New World Mortgage, Co., Inc. 570 Fed. Appx. 28, 326 (2d Cir. 2014) *quoting Transatl. Marine Claims Agency v. Ace Shipping Corp.*, 109 F.3d 105, 111 (2d Cir. 1997) *and Anderson, supra* at 687; *see Grochowski v. Phoenix Constr.,* 318 F.3d 80, 88-89 (2d Cir. 2003) (testimony that plaintiffs "'usually' worked" certain hours and did not know if they worked every Saturday was "only speculation to establish what hours these plaintiffs worked" and did not "present sufficient evidence for the jury to make a reasonable inference as to the number of

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and liquidated damages." *Gangi v. D.A. Schulte, Inc.*, 150 F.2d 694, 697 (2d Cir. 1945), *aff'd*, 328 U.S. 108 (1946).

hours worked by the … employees"). A plaintiff may not speculate as to the overtime allegedly worked (*Kolesnikow v. Hudson Valley Hosp. Ctr.*, 622 F. Supp. 2d 98,118 (S.D.N.Y. 2009)), and must show that the employer had actual or imputed knowledge that the employee was working during those uncompensated hours. *See Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 287 (2d Cir. 2008) *citing* 29 U.S.C. § 203(g).

Here, although Plaintiff claims he worked overtime and was not paid for same, for a number of reasons no reasonable inference can be drawn to credit his claim.

A. Payroll Records Prove That Plaintiff Was Paid Overtime

Defendant's payroll records show that on numerous occasions Plaintiff was paid overtime for work he had performed. For example, on several occasions Plaintiff himself submitted timesheets that requested payment for overtime, including:

1. Week ending January 9, 2012: 6 hours of overtime because of boiler problems.
2. Week ending November 5, 2012: 32 hours of time due to Hurricane Sandy.
3. Week ending January 7, 2013: 4 hours of overtime.
4. Week ending January 28, 2013: 10 hours of overtime due to boiler problems.
5. Week ending February 12, 2013: 4 hours due to snow removal.
6. Week ending November 25, 2013: 12 hours of overtime.

(Ex. 3 at p. 00022, 00042, 00047, 00049 and 00067). All of this time was paid. (*See* Exs. 2, 3). Plaintiff points to no facts to suggest that Defendants records are in any way inaccurate (Tr. 71). While Defendants have payroll records demonstrating that overtime was paid in each week it was reported, Plaintiff admittedly cannot identify a single time when he asked for overtime and was denied (Tr. 115).

B. Text Messages Do Not Support Plaintiff's Claims

Plaintiff claims that he worked beyond the hours he reported, but has no documentary evidence to support his claims. Indeed, the best evidence—three years of text message conversations between Plaintiff and his supervisor—do not show any instance of Plaintiff being denied overtime for time he worked or anytime when Plaintiff was instructed not to report his overtime (Ex. 1). The lack of such evidence speaks volumes. It strains credulity for Plaintiff to claim he was denied overtime for that same three year period, but not have a single instance text or e-mail from his supervisor instructing him not report his overtime. In fact, the text messages show that at the same time Plaintiff was trying to get a job for his son with the same Defendants he now claims denied him overtime! (Ex. 1 at p. 00307).

C. Plaintiff Never Complained To His Union About Not Receiving Overtime

The testimony of Plaintiff's union representative, Mary Clanton, further disproves Plaintiff's claim that he was not properly paid overtime. Clanton, who has been Vice President of Local 2 since 2009, testified that Plaintiff never complained either verbally or in writing about not being paid overtime:

> Q Did [Plaintiff] ever tell you that he was not getting paid time and one half for hours worked over 40 in a workweek?
> A No.
> Q Did he ever complain that he was not getting overtime for working more than eight hours in a day?
> A No.
> Q Does the union have any record of any allegation by [Plaintiff] that Melohn Properties or any employer of [Plaintiff] was not paying him overtime?
> A No.
> Q Just to be clear, as far as you know, does the union have any documentation – such as a grievance, a complaint – suggesting that [Plaintiff] was not getting overtime while working at 4750 Bedford Avenue?
> A No.

(Clanton Dep. 9-10). Even when questioned by Plaintiff's counsel Ms. Clanton confirmed there was no record of any call or grievance about overtime being denied to Plaintiff during any of the years she worked for Local 2. (*Id.* at 60-61). Had Plaintiff complained, Clanton testified that she "would institute a grievance to get that reimbursed to the employees." (*Id.* at 11).

The only "evidence" Plaintiff offers in purported support of his claim is his own, self-serving, vague and contradictory testimony about reporting overtime complaints to the union. For example, Plaintiff initially claimed that he spoke to the union about overtime, even though he had no recollection of who he spoke to (Tr. 36-37). He then thought he might have spoken with someone named Lydia, but was not sure when that would have been (Tr. 46). But Plaintiff then contradicted his earlier testimony and testified that he actually did not know if he ever addressed this overtime issue with the union at all (Tr. 158), and said he did not know why he did not ask the union to pursue this overtime issue. (Tr. 123). Also significant is the undisputed fact that when Plaintiff thought he was owed money he spoke up and demanded payment in writing, as he did in May 2014 when he demanded payment for his accrued vacation. (Ex. 9).

D. Plaintiff's Vague and Speculative Testimony

"Bare allegations and vague undocumented estimates [of hours worked]" are insufficient to survive summary judgment. *Millington v. Morrow Cty. Bd. of Comm'rs*, 2007 U.S. Dist. LEXIS 74348, *19 (S.D. Ohio 2007); *see Daniels v. Finish Line, Inc.*, 2008 U.S. Dist. LEXIS 122094, *8 (E.D. Cal. 2008) (granting summary judgment to employer because plaintiff submitted no evidence beyond bare allegations and vague undocumented estimates to support his claim that he was not adequately compensated and forced to work off the clock).

Plaintiff's testimony about working overtime is, by itself, not credible. When asked about how much overtime he worked, Plaintiff provided little information beyond vague speculation.

> Q ... in terms of your recollection, can you tell me -- in any of the weeks in 2012 on this calendar, can you tell me how many hours you actually worked in any of those weeks?
> A I don't remember.
> Q Is it fair to say you don't know the number of hours you worked in any of the weeks in 2013?
> A I don't remember.
> Q And is it fair to say you don't know the number of hours you worked in 2014?
> A I don't remember.
> Q So you don't know how much overtime you worked in any

of those weeks; is that fair?
A I don't remember, honestly.
* * *
Q Could you tell me how much overtime you worked in all of 2013?
A A lot of overtime.
Q How much?
A I cannot tell you the number.
Q Can you tell me the number of how much overtime you worked in 2014?
A I don't know.

(Tr. 85-86, 147-148). Although Plaintiff testified that "sometimes" he performed repairs after hours he did not write down what he did and did not know which days he performed the alleged work (Tr. 148). Plaintiff further testified that could not identify any of the repairs he performed:

Q Can you tell me any of those repairs you did [after working hours] in January of 2013?
A Like I said, I really don't remember.
Q Can you tell me what work you did in February of 2013?
A I don't remember.
Q Can you tell me any particular repairs you did in 2014?
A I don't remember.
Q Can you tell me any particular repairs you did in 2012?
A I don't remember those things. I had a working sheet.
***
Q Those working sheets, those are the working sheets that were thrown out, correct?
A Yeah.

(Tr. 149).

Further, when deposed and shown the damage calculations Plaintiffs' attorneys submitted in his Rule 26 disclosures (Ex. 20), Plaintiff did not know whether the calculations were correct or if he had worked the hours used as a basis for those calculations (Tr. 156). In his Rule 26 Disclosures, Plaintiff claims to have worked 84 hours every week of every year for 3 years. (Ex. 20). However, during discovery Plaintiff submitted verified interrogatory responses in which he claimed to have worked 168 hours every week of every year for 3 years (Ex. 35). But then in Paragraph 22 of his Third Amended Complaint, and in his three prior complaints, Plaintiff claimed he only averaged working 53 hours per week. Thus, not only was Plaintiff's deposition testimony inconsistent with his prior sworn verification, but the evidence conjured up by counsel was also directly at odds with each other. Plaintiff's speculation cannot stave off dismissal of his claims. *See, e.g.*, *Blakes v. Ill. Bell Tel. Co.* , 75 F. Supp. 3d 792, 811 (N.D. Ill. 2014) ("courts require more than speculative or vague evidence of actual or constructive knowledge of unpaid overtime to overcome a motion for summary judgment"); *Oti v. Green Oaks SCC, LLC*, 2015 U.S. Dist. LEXIS 8629, *7 (N.D. Tex. 2015) (granting summary judgment for the defendant where "[a]side from plaintiff's admitted guess as to how many overtime hours she worked, [plaintiff] ha[d] produced no factual" evidence to support "when those hours were worked, what work was accomplished, or for how many of those hours she was not paid"); *Millington*, *supra* at *19 (plaintiff's allegation that he worked "an average of five hours every week at home" in uncompensated overtime insufficient to survive summary judgment).

In *Kolesnikow v. Hudson Valley Hosp. Ctr.*, 622 F. Supp. 2d 98 (S.D.N.Y. 2009), for example, a nursing assistant claimed to have worked more hours than were on her timesheets. In dismissing her overtime claims, the court noted that the plaintiff offered no evidence regarding the amount of extra time she allegedly worked each week and the court had no way to determine whether she worked more than 40 hours per week. *Id.* at 119. The plaintiff had testified that in 2 to 4 weeks per month, she worked an unspecified amount of time over 40 hours per week, that she "sometimes" worked through her half-hour lunch break once per week, and that she worked an unspecified amount of time past the end of her shift 2 or more times per week. *Id.* at 118. The court concluded that "Kolesnikow's testimony does not provide a sufficient basis to infer that she worked more than 40 hours in any given week." *Id.* at 119. As stated by the court:

> [Plainitff] has not offered the 'concrete particulars' that are required of a plaintiff in order to defeat a properly supported motion for summary judgment. ... She has not provided any factual

> basis to support a finding that she worked overtime hours for which she was not paid. While there are cases in which FLSA plaintiffs have defeated summary judgment motions based on their own testimony, those plaintiffs have offered credible testimony approximating the number of hours they worked without pay. ... Accordingly, [defendant] is entitled to summary judgment on [plaintiff's] claim for overtime compensation under the FLSA.

Id. (internal citations omitted).

As in *Kolesnikow,* this case is not one where the Plaintiff has offered credible testimony approximating the number of uncompensated overtime hours. Rather, Plaintiff here "sometimes" worked a few hours after his shift and "sometimes" he did not. This is pure speculation, especially considering Plaintiff's alleged "proof" (*i.e.*, worksheets and texts messages) were not preserved. *See DiSantis v. Morgan Props. Payroll Servs*., 2010 U.S. Dist. LEXIS 96838, *41-42 (E.D. Pa. 2010) ("DiSantis' use of language such as 'sometimes' and 'pretty much' highlights the vagueness of her testimony. Further, her testimony is also scattered and inconsistent, as evidenced by her references to 'pretty much every week' and 'almost every week' at some points in her testimony when she attempts to specify when she worked unpaid overtime, as compared to other parts of her testimony where she tries to narrow the time frame. As many federal courts have found, this type of evidence is insufficient at the summary judgment stage."); *Rosano v. Teaneck*, 754 F.3d 177, 189-190 (3d Cir. 2014) (dismissing plaintiffs' claims that they worked more hours than reflected on the time records; "absent any evidence to support the officers' estimates of their overtime damages, [plaintiffs'] calculations … become mere speculation, and are insufficient to support the requisite inference necessary to meet their burden."); *Oti*, 2015 U.S. Dist. LEXIS 8629 at *7 (dismissing speculative overtime claims; "Aside from plaintiff's admitted guess as to how many overtime hours she worked, [plaintiff] has produced no factual" evidence to support "when those hours were worked, what work was accomplished, or for how many of those hours she was not paid. Furthermore, she can point to no records which under report her time."); *Simmons v. Wal-mart Assocs., Inc.*, 2005 U.S. Dist. LEXIS 21772 (S.D. Ohio 2005) (summary judgment granted against plaintiff testified to "bald assertions" that he had worked off the clock approximately 200 times over a four-year period and allegedly kept a personal log of hours worked, but did not offer the log into evidence); *Holaway v. Stratasys, Inc.*, 771 F.3d 1057 (8th Cir. 2014) (affirming summary judgment for defendant because although plaintiff approximated that he worked 60 hours per week, he failed to provide evidence of specific weeks he worked overtime and "a meaningful explanation" for how he arrived at his final estimate); *Brand v. Comcast Corp.*, 2015 U.S. Dist. LEXIS 130114, *75-76 (N.D. Il. 2015) (dismissing overtime claims by employees who claimed they perhaps they took less than their full lunch period a few times a month and that once or twice per week 70-75% of their lunch was interrupted; "[T]he language [plaintiffs] use about how often they 'maybe' or 'probably' worked through lunch suggests guesswork. They point to no explanation as to how they reached their estimates nor do they point to any memory 'triggering factors' or other details providing the basis for their recollection[.]"); *Joiner v. Bd. of Trs. of the Flavius J. Witham Mem'l Hosp.*, 2014 U.S. Dist. LEXIS 96928, *20-22 (S.D. Ind. 2014) (plaintiffs' assertions that lunches were interrupted "two or three times a week" and "practically every day" are general assertions insufficient to overcome summary judgment).[5]

E. Plaintiff's Spoliation of Relevant Evidence

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[5] *See also Adami v. Cardo Windows, Inc.*, 2015 U.S. Dist. LEXIS 41116, *26-27 (D.N.J. 2015) (FLSA overtime claims dismissed because plaintiffs failed "to show the amount of time and extent of work for … as a matter of just and reasonable inference" and instead "relied exclusively on Plaintiffs' testimony that they worked 10-14 hours a day, six days per week ... [and] have not identified any authority indicating that they may disregard records of actual work performed and rely on their unsupported allegations regarding the number of hours worked, when there are documents in the record which contradict their blanket assertions and from which a meaningful estimate of hours worked and a resulting damages calculation may be made."); *Daniels*, 2008 U.S. Dist. LEXIS 122094 at *8 (finding that Plaintiff could not survive summary judgment because he submitted no evidence beyond bare allegations and vague undocumented estimates to support his claim that his employer did not provide adequate compensation and forced him to work off the clock); *McCrimon v. Inner City Nursing Home, Inc.*, 2011 U.S. Dist. LEXIS 113302, *3-4, *10-14 (N.D. Ohio 2011) (summary judgment granted on plaintiff's claim that she "worked uncompensated overtime on many occasions" at her supervisor's instruction where plaintiff did not produce supporting records).

Plaintiff claims to have had worksheets that supported these claims but they were discarded and are no longer available. According to Plaintiff, on September 3, 2014—two months after the building was sold but while he was still living there (and coincidentally the day he signed the settlement agreement) — he returned to the office where he had worked and asked for the records that purportedly support his claim of performing after-hours repairs. While Plaintiff admitted that he had retrieved his tools immediately in July 2014, he did not bother to retrieve his records at that time he "was busy doing other things" (Tr. 237). Even on September 3, 2014 he did not retrieve the documents. Several weeks thereafter the records were discarded (Ex. 34, pp. 5-6).

Moreover, Plaintiff's own text messages, that he contends support his claim that he worked and asked for overtime, were not preserved. As Plaintiff testified when deposed:

> Q You say you him a text asking for overtime?
> A Probably.
> Q I'm not asking you to guess.
> Do you have a specific recollection of sending Mr. Melohn a text asking for overtime?
> A I don't have it, because like I said, nothing was saved.

(Tr. 48)

* * *

> Q So it's fair to say you don't have any text messages in your possession between you and anyone at Melohn?
> A No, I don't have it here.
> Q Anywhere?
> A No. It used -- it used to be on my old phone, but I give it to my wife … and she went to get connected, right, and they delete everything.
> Q When did that happen?
> A Like about a year ago.
> Q So maybe January of 2015 about?
> A I'm not sure of the month, but I would say like about a year ago.
> Q *So it was after the lawsuit was started, everything got deleted?*
> A *I would say.*
> Q And that would have included any text messages you had between yourself and anyone at Melohn?
> A Yes.

Q Did you understand you had a duty to preserve documents like that?
A Yeah, I understand.

(Tr. 40, emphasis added). Plaintiff further testified that no one had informed him, verbally or otherwise, of his duty to preserve documents. (Tr. 190).

Plaintiff's failure to preserve critical evidence in this case cannot be overstated. The worksheets that allegedly "listed all the work" Plaintiff now claims he performed, and that were in his desk for months, were discarded (Tr. 131). The records would presumably show when the work was done, *i.e.,* during the normal work day or on overtime, and have provided Defendants with an opportunity to investigate Plaintiff's claims. Further, the text messages Plaintiff had with Melohn employees purportedly supporting his claim for overtime were destroyed *after* this litigation commenced. This kind of spoliation should preclude Plaintiff from going forward.

The Second Circuit has defined spoliation as "the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 107 (2d Cir. 2001). A party may be subject to sanctions if, by his acts or omissions, he significantly alters evidence that may be used in reasonably foreseeable litigation. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) "[A]nyone who anticipates being a party or is a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary." *Zubulake v.UBS Warburg L.L.C. (Zubulake IV)*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).[6]

In *Sekisui America Corp. v. Hart*, 945 F. Supp. 2d 494 (S.D.N.Y. 2013), for example, the court applied Rule 37 and Circuit precedent in awarding an adverse inference sanction for failure to preserve evidence. The court found that defendants had belatedly implemented a litigation

[6] This obligation to preserve relevant evidence exists whether or not the documents have been specifically requested in a demand for discovery or whether there has been an explicit discovery order issued. *Kronisch v. U.S.*, 150 F.3d 112, 126-127 (2d Cir. 1998).

hold and that potentially relevant ESI, including the emails of several individuals, had been permanently deleted. *Id.* at 507-508. The court went on to hold that the failure to issue a timely litigation hold constituted gross negligence, and that the related destruction of ESI was "intentional." *Id.* On that basis, the court further held that "prejudice is therefore presumed" and awarded an adverse inference jury instruction against the defendants. *Id.* at 509; *accord Pension Comm. v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 488 (S.D.N.Y. 2010) ("the failure to issue a written litigation hold in a timely manner amounts to gross negligence").

Plaintiff here testified that no one told him, verbally or otherwise, that he was supposed to preserve documents related to the claims he asserts in this lawsuit until just prior to his January 2016 deposition. (Tr. 190, 283). He never received anything in writing advising him of his preservation obligation. (Tr. 190). Text messages were discarded *after* this lawsuit commenced. Under these circumstances, there is a very strong inference that the information Plaintiff had would support Defendant's position (*i.e.*, that no instance when overtime was worked and not paid), which undercuts Plaintiff's burden of proof (*i.e.*, he must provide a "just and reasonable inference" that he performed uncompensated work).

In *Tracy v. NVR, Inc.*, 2012 U.S. Dist. LEXIS 44350 (W.D.N.Y. 2012), a plaintiff claiming to be owed overtime wages under the FLSA failed to preserve calendars which would have showed the kind of work that Plaintiff was performing. As a result, the court "precluded [the plaintiff] from offering evidence regarding her daily work activities during the period August 2000 through December 2003" because "[t]he record plainly establishes that she destroyed or lost important records containing information not only relevant, but central, to the issue of how and where she spent her time each day while employed[.]" *Id* at *42-43, *47. The court further noted that "'a finding of bad faith or intentional misconduct is not a *sine qua non* to sanctioning a spoliator.' Rather, a finding of gross negligence or knowing or negligent destruction of evidence will satisfy the 'culpable state of mind" requirement." *Id. quoting Reilly v. NatWest Mkts. Grp., Inc.*, 181 F.3d 253, 268 (2d Cir. 1999). In short Plaintiff's own spoliation and the resulting negative inference destroys Plaintiff's burden of proof in this case.

F. Plaintiff Admittedly Did Not Report His Overtime

Plaintiff claims he was told that he should not report his overtime. This allegation flies in the face of the fact that he did report overtime on a number of occasions, that his union representative was unaware of any denial of overtime such claim and that there is not one text message or email from Defendants advising him not to report overtime.

But even Plaintiff's claim were true, it is not dipositive. Indeed, in *Garofolo v. Donald B. Heslep Associates,* 405 F.3d 194 (4th Cir. 2005), after being terminated, plaintiffs sought overtime beyond the hours they had reported to the defendant employer and belatedly argued their supervisor told them that submitting overtime requests "doesn't look good." *Id.* at 197. The court, however, rejected their claims noting that for "nearly three years, the Garofolos submitted monthly certifications confirming that 40 hours continued to be a reasonable estimate of the time needed to complete their duties as resident managers." *Id.* at 200.

Similarly, in *Ihegword v. Harris County Hosp. Dist.*, 929 F. Supp. 2d 635 (S.D. Tex. 2013), *aff'd*, 2014 U.S. App. LEXIS 2669 (5th Cir. 2014), the plaintiff claimed that she often worked overtime without compensation in violation of the FLSA and that her supervisor instructed employees to clock out and then complete their work if overtime was necessary. The court rejected this claim:

> The allegations that plaintiff has made in her Original Complaint and in her deposition that defendant required her to work hours of uncompensated overtime beyond the end of each shift by clocking out and continuing to work 'off the clock' are soundly refuted by HCHD's records of plaintiff's time card reports between December 24, 2007, and her discharge on May 29, 2009, which show that plaintiff 'worked past her scheduled shift *on the clock*, ranging from a few minutes to almost two hours.

Id. at 665. The court also noted that the plaintiff's estimate that she worked approximately twelve hours of uncompensated overtime a week, constituted "unsubstantiated and speculative estimate of uncompensated overtime [and] does not constitute evidence sufficient to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 668.

In this case Plaintiff has not only made claims belied by timesheets he personally prepared and submitted on a weekly basis, but his purported evidence in support was either destroyed or not preserved by him. Plaintiff's deposition testimony and court documents further demonstrate his sheer speculation as to the amount of uncompensated overtime in this case—*i.e.*, he claims to have worked 53 hours per week in his pleadings, 84 hours per week in his Rule 26 Disclosures, 168 hours per week in his verified interrogatory responses, and merely a "lot of overtime" but does not know how much when deposed. Especially considering Defendants' documentary evidence, Plaintiff's vague and inconsistent evidence fails to raise any reasonable inference that he was not properly compensated. There simply is no credible evidence upon which Plaintiff can show, as he must, the amount and extent of the uncompensated work is a matter of just and reasonable inference.

Finally, as occurred here, the plaintiff in *Harvill v. Westward Communications LLC*, 433 F.3d 428 (5th Cir. 2005), also claimed to have worked overtime despite what she had reported on her timesheets. The court there nonetheless granted summary judgment to the employer:

> In the district court, Harvill's argument against summary judgment on her FLSA claim consisted of her unsubstantiated assertions that French required her to turn in false time sheets, and that Westward "clearly suffered or permitted" her to work overtime. She contended that it was up to the jury to decide who was telling the truth. She offered no factual allegations at all to substantiate her claim, and she presented no evidence of the amount or the extent of hours she worked without compensation. Moreover, she presented no evidence that Westward was aware that she worked overtime hours without compensation. On appeal, Harvill only adds to her argument the assertion that she worked 210 hours of unpaid overtime. Again, she

> offers absolutely no evidence that she actually worked the hours she alleges, or that Westward was aware that she worked overtime hours without compensation. Harvill has failed to raise a genuine issue of material fact as to whether she went uncompensated for overtime work. Accordingly, the district court did not err in granting summary judgment for Westward on Harvill's FLSA claim.

Id. at 44; *Fairchild v. All Am. Cash Checking, Inc.*, 811 F.3d 776, 782 (5th Cir.), *aff'd en banc* 815 F.3d 959, 965 (5th Cir. 2016) (dismissing FLSA claim where plaintiff "testified that she intentionally failed to report her unauthorized overtime specifically because [her employer] prohibited such overtime;" "[t]o hold that she is entitled to deliberately evade [the employer's] policy would improperly deny [its] 'right to require an employee to adhere to its procedures for claiming overtime'").

Defendants here had more than a policy allowing employees to be paid overtime; there was a union contract mandating it. Yet Plaintiff never complained to his union or the Defendants about not being paid overtime. Instead Plaintiff now claims, like the plaintiffs in *Garofolo, Ihegword* and *Fairchild* above that he was told not to report the overtime, but has failed to produce any evidence other than his self-serving and after-the-fact speculation. At no time was Plaintiff advised by Defendants not to report overtime or that he would not be paid for overtime worked. (*See* Melohn Aff. ¶¶20-21; Gottlieb Aff. ¶14-15). To the contrary, when Plaintiff worked the overtime, he reported it and was appropriately paid. (*Id.*). Plaintiff has offered no credible evidence that he was not paid for overtime worked.

In short, all of these six factors set forth above more than negate any "just and reasonable inference" of overtime worked.

POINT IV 29 CFR §785.23 BARS PLAINTIFF'S CLAIMS

A. Plaintiff is Not Entitled to be Paid for On Call time

Not only is there little credible evidence that Plaintiff worked overtime but his claim that he worked 24 hours per day, 7 days per week is contrary to 29 CFR § 785.23, which states:

> **Employees residing on employer's premises or working at home.** An employee who resides on his employer' premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted.

In fact, when deposed, Plaintiff admitted that he did not work 24 hours per day (Tr. 221) and that the only overtime he was owed was for repairs (Tr. 151). After 5:00 p.m. he was free to be in his apartment and watch television, go on to the computer or do anything he wanted to do, including go to the gym, movies or supermarket or to get a haircut (Tr. 222-224, 226). Under these circumstances, Plaintiff is not entitled to be paid for his on call time.

In fact, Department of Labor regulations specifically state that "[i]f employees who are thus on call are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may be reached, the hours spent 'on call' are not considered as hours worked." 29 C.F.R. § 778.223; *see* 29 C.F.R. § 785.17. Thus, the ultimate question in deciding whether purported on call time is compensable is "whether the restrictions placed on the employee preclude using the time for personal pursuits." 29 C.F.R. § 553.221(d)*; see Daniels v. 1710 Realty*, 2011 WL 3648245, *6 (E.D.N.Y. 2011) ("When an employee is not confined to his home or any particular place and may come and go as he pleases, the 'hours spent 'on call' are not considered as hours worked'" (*quoting Nonnenmann v. City of New York*, 2004 WL 1119648 (S.D.N.Y. 2004)); *Zhong v. Zijun Mo.*, 2012 U.S. Dist. LEXIS 99966, *15 (E.D.N.Y. 2012)("on-call" time is not compensable when employee is able to use the time for her own benefit, including gambling, shopping, or engaging in other personal activities).

B. Plaintiff's Free Apartment, Utilities and Parking is Consistent with the "Reasonable Agreement" Requirements of the Regulations

Assuming, *arguendo*, that Plaintiff was not paid for work outside his normal hours, there still is no violation of law. As set forth above, 29 CFR § 785.23 provides that "any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted." Here, the Plaintiff testified that for the approximately 20 years of his employment, in exchange for him not being paid overtime for making certain repairs, he was given free rent, utilities and parking from Defendants (Tr. 30, 229). Indeed, that was part of the "deal" of being a superintendent (Tr. 31, 35). Moreover, Plaintiff's union contract with Defendants required Plaintiff, as superintendent to "take care of emergencies" (Ex. 26 at p. 10), and Plaintiff testified that it was his job to take care of emergencies and that he was given his apartment rent-free in exchange for doing so. (Tr. 198-200).

Courts have dismissed claims for overtime of residential employees under similar circumstances. For example, in *Garofolo*, *supra,* the resident employee plaintiffs entered into an employment agreement with the owner of a self-storage facility. After working for the defendant for years, the *Garofolo* plaintiffs claimed that they had worked more than forty hours a week. The district court granted summary judgment in favor of defendants on the grounds that the Garofolos were fully compensated under the terms of a reasonable employment agreement between the parties. The Fourth Circuit then concluded that a reasonable agreement under Section 785.23 existed between the parties, and, therefore "[s]tanding alone, proof that the [plaintiff] worked more than 40 hours per week would not preclude summary judgment." *Garofolo*, 405 F.3d at 200. The circuit court further made it clear that a district court need not determine the number of hours actually worked in order to determine if a reasonable agreement existed in a case governed by Section 785.23. *Id.* at 201.

Similarly, in *Myers v. Baltimore County*, 50 Fed. Appx. 583 (4th Cir. 2002), resident caretakers of public parks were not paid a salary but were given free housing and water. Their claims for minimum wage and overtime were dismissed because "in exchange for the FLSA work, the Caretakers received rent-free accommodation in or near a county park and free water." *Id.* at 589. The fact that the actual number of hours worked was not ascertained was of no moment "[b]ecause the purpose of 29 C.F.R. §785.23 is to address situations in which it is difficult, if not impossible, to determine the exact time worked" and "a finding of the exact hours worked may not be required to determine whether the agreement was reasonable." *Id.*

Here, even accepting Plaintiff's version of the facts, his claims must be dismissed. Plaintiff claims he was told that in exchange for a free apartment (a "junior four" which Plaintiff valued at between $1100 and $1200 per month), free utilities (approximately $200 per month) and a free parking spot ($150 per month), he was expected to make repairs on the building. He was also still receiving his base salary of $900.00 per week and reported overtime, as well as paid holidays, vacation and other benefits provided for under the union contract. Thus, even if Plaintiffs version of facts is accepted his claim must be dismissed as such an agreement is entirely reasonable. Indeed, if the caretakers in *Myers* received *no pay* for their work and such an arrangement was found to be reasonable, then the arrangement herein must *a fortiori* be deemed reasonable. Plaintiff here worked relatively independently and there is no way for the hours to be tracked other than what he reported to Defendants—or in this case what he now states in contrast to his own prior reports. This is precisely the kind of situation Section 785.23 is intended to address. Plaintiff's claims for unpaid overtime may not proceed.

POINT V INDIVIDUAL DEFENDANTS ALFONS AND LEON MELOHN MUST BE DISMISSED FROM THE CASE

"A person may not be held individually liable for a company's FLSA violations simply because he was an executive of that company." *Alladin v. Paramount Mgmt.*, 2013 WL 4526002, *4 (S.D.N.Y. 2013); *see Manning v. Boston Med. Ctr. Corp.*, 725 F.3d 34, 50-51 (1st Cir. 2013) (merely holding a high-level supervisory or executive position is not enough to trigger individual FLSA liability). Indeed, as the Second Circuit has held:

> Evidence that an individual is an owner or officer of a company, or otherwise makes corporate decisions that have nothing to do with an employee's function, is insufficient to demonstrate "employer" status. Instead, to be an "employer," an individual defendant must possess control over a company's actual "operations" in a manner that relates to a plaintiff's employment. It is appropriate ... to require some degree of individual involvement in a company in a manner that affects employment-related factors such as workplace conditions and operations, personnel, or compensation — even if this appears to establish a higher threshold for individual liability than for corporate "employer" status.

Irizarry v. Catsimatidis, 722 F.3d 99, 109 (2d Cir. 2013). Plaintiff here has no evidence as to what input or impact, if any, Leon or Alfons Melohn had on his working conditions. (Tr. 245-246). All claims against Leon and Alfons Melohn must be dismissed.

CONCLUSION

For all of the foregoing reasons, this Court should grant Defendants' motion for summary judgment in its entirety and dismiss all claims asserted in the Third Amended Complaint, and issue judgment for the Defendants on their counterclaim. If any portion of the case remains, it should be tried to the Court as Plaintiff has waived his right to a trial by jury.

Dated: Garden City, New York
May 12, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2016 the foregoing document was filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Southern District's Local Rules on Electronic Service upon the following parties and participants:

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